prayer, it is settled law that in order to set aside a judgment obtained regularly, there must be an affidavit of merits. *Evans* v. *Bartlam* [1] is usually referred to as supplying the governing rule in this context. It is at any rate a decision explicitly arising out of a judgment by default. That case was followed by Smith J. in *Leong Han* v. *Kuppusamy* [2] and by Hepworth J. in *The South British Insurance Co. Ltd.* v. *Haji Ismail* [3] and referred to by Good J. in *The Chinese Tin Mines Rehabilitation Loans Board* v. *Chee Hoi Voon.* [4]

Insofar as the defendant did not enter appearance and in consequence the plaintiff was entitled to judgment by default as prayed, the judgment was obtained regularly. What he has to establish now is whether he has adduced evidence that he has a *prima facie* defence.

In his affidavit, the defendant deposed that on 20th May, 1965, he requested the plaintiff's solicitor to grant him a period of three years to complete the sub-division of the said land so that he could obtain a separate title for the portion sold to the plaintiff. The said solicitor agreed, and he accordingly did not appear nor did he file his defence. In reply, the plaintiff affirmed that that was not true. He deposed that the defendant offered to purchase the said land at double the price which he did not agree, and he accordingly instructed his solicitor to prosecute the case. The plaintiff has paid all the purchase price under the agreement; he has therefore fulfilled his part of the bargain. It is now for the defendant to complete his part of the bargain by transferring the said land to the plaintiff. In the circumstances, has he a good defence on the merits? The defendant has done nothing constructive to have the land sub-divided since 1958. In fact, he admitted all this but prays for time to sub-divide the land since he averred that time is not of the essence of the contract. I am satisfied that he has no defence on the merits.

The motion is therefore dismissed with costs.

Motion dismissed.

Solicitors: *M. N. Cumarasami & Co.; K. L. Devaser & Co.*

LIEW YU FATT v. TECK GUAN & CO. LTD.

[O.C.J. (McGilligan J.) November 17, 1965]

[Jesselton — Civil Suit No. 44 of 1965]

Damages — Compensation for alleged loss of use of log pond — Trespass — Costs.

In this case it appeared from the facts that the defendants had been granted a temporary occupation licence of land for the purpose of building a log pond for storing timber. In building their log ponds they went beyond the area held by them under the licence and on to land which was subsequently given to the plaintiff on a temporary occupation licence. The plaintiff claimed damages (a) for compensation for the alleged loss of the use of the log pond, such loss being caused by the defendant's unlawful occupation of the log pond; alternatively (b) for damages for trespass.

Held: (1) there could be no claim for contract or quasi-contract in this case as the occupation of the log pond by the defendants was unlawful and without the permission of the plaintiff;

(2) the plaintiff was entitled to damages for trespass but as he had grossly inflated and exaggerated his claim for damages, he would not be awarded costs.

Cases referred to:—

(1) *Cheong Kee Teck* v. *Quah Hoay Kwan & Others* [1964] M.L.J. 224 at p. 231.

(2) *Whitwham* v. *Westminister Brymbo Coal and Coke & Co.* [1896] 2 Ch.D. 538 at p. 541.

CIVIL SUIT.

V. Kumar for the plaintiff.

J. Trelaven for the defendants.

Cur. Adv. Vult.

McGilligan J.: The plaintiff's claim is based on an allegation of unlawful use and occupation by the defendants of what he says is his log pond at an area by the sea known as Tanjong Batu; this area is 2 or 3 miles from Tawau Town.

A log pond is a fenced-in portion of the sea, the sea-shore being one of its sides, and its other 3 sides being formed largely by lines of piles, i.e., heavy wooden stakes driven into the sea-bed. The main use of a log pond is for the storage of cut timber waiting to be loaded on to an exporting ship.

At Tanjong Batu there is a large piece of land fronting the sea, which is held on lease (P.L. No. 16148) by Mr. Hong Teck Guan, one of the directors of the defendant company. On the sea side of this piece of land there are two log ponds, as may be seen from the plan, Exhibit P.18. The court inspected the area, and the plan is accepted as being correct in every detail. The larger, more northerly, pond I shall call the large pond, and the smaller, more southerly, the small log pond.

The history of these ponds (and I am now making findings of fact) is this: On the 9th day of June the defendants were granted a temporary occupation licence over 800 feet (along the shore) by 400 feet (out to sea) at Tanjong Batu. On the 10th of November 1962 they were granted an extension of 200 feet (along the shore) by 400 feet out to sea, and the rent payable was increased to $200 a month. In 1961 and 1962 the defendants at the site held under temporary occupation licence by them fenced in an area of about 787 feet (along the shore) by between 800 and 1000 feet (out to sea) (This latter length I take from the statement of Mr. Hong Seng Ho, general manager of the defendant company, and from the plaintiff's evidence).

This area is the large log pond. In so fencing in the defendants went, out to sea, 400 to 600 feet beyond the area held by them under temporary occupation licence. Later, some time in the first half of 1963, the defendants fenced in a further area, south-east of the large log pond, of about 550 feet (along the shore) by about 800 feet (out to sea). This area is the small log pond. In so doing they went, along the shore, about 337 feet beyond the area held by them under temporary occupation licence, and, out to sea, about 400 to 600 feet beyond. On the 21st of May 1963 the plaintiff was granted a temporary occupation licence over an area, immediately to the left, (as one faces the sea), and south-east, of the area held by the defendants under temporary occupation licence, of 600 feet, (along the shore) by 600 feet (out to sea). The defendants are by, and because of the making of, the small log pond, in encroachment on about 337 feet by 600 feet of the area held by the plaintiff under temporary occupation licence.

I have made the finding that on the 10th of November 1962 the defendants were granted an extension of 200 x 400 feet on the strength of exhibits D.5 and D.4, which show the application for a further area of 200 x 400 feet and the approval of that application. I am satisfied that the 8000 square feet written on Exhibit D.5 and on the defendants' temporary occupation licence resulted from a mistake in arithmetic, and should be 80,000 square feet. No-one would bother to apply for an extension of a mere 20 feet along the shore.

In parenthesis, I must here say that the temporary occupation licences with which we are concerned were granted under the Land Ordinance and are exactly the same as those used in respect of what is literally land, *terra firma*. For the purposes of this case and of the law the areas of sea and sea shore held under these temporary occupation licences (and indeed the areas contained in the two log ponds) is land. I shall sometimes refer to those areas, for convenience, as sea-land.

When the small log pond was completed is of importance, and is a difficult point. Mr. Hong Seng Ho, general manager of the defendant company, said that the second piling (which created the small log pond) was done in 1963, about March. Another defence witness, Mr. Khoo Choon Seng, said that the further, or second, lot of piling was done about the end of April 1963. Another, Mr. Voo Hong Kui, said under cross-examination that he could not remember when the piling of the small pond was done, but that it was "sometime in 1963". He also said, (this also under cross-examination) "on May the 15th 1963 when logs came from the forest they were towed by motor launches from sea through this opening" indicating the opening in the small log pond markd 'x' on the plan, Exhibit P.18.

The plaintiff's witness, Ahmat bin Udang, said there were "stakes" in Towkey Liew Fatt's log pond in June 1963, which were put there by Teck Guan. Ahmad bin Haji Ismail, whom the plaintiff employed to make a log pond for him, said that when he first inspected the Tanjong Batu site there were no stakes in the plaintiff's area, but he did not say when the inspection was made. He also said that when he brought a raft (of logs for piling) to Tanjong Batu in September 1963 Teck Guan had already erected a fence there; to the court he said he saw Teck Guan's men making the fence. The plaintiff's own evidence was to the effect that the piling of the small log pond was done about July 1963.

I cannot accept this evidence of the plaintiff and of Ahmad bin Haji Ismail. Ahmad's evidence is somewhat self-contradictory, and it is not easily reconcilable with the plaintiff's. They both disagree with what Ahmat bin Udang said. Further, in the bill (which, as will later be seen, the plaintiff sent to the defendants), and in his statement of claim the plaintiff claims for use and occupation from the 1st day of June 1963.

The plaintiff has failed to show, as a matter of greater probability, that the small log pond was started or finished after he got his temporary occupation licence. On the probabilities, indeed, and influenced by the incidental, as it were, answer of Mr. Voo Heng Kui indicating the existence of the small log pond on 15th May 1963, I find that the small log pond was finished before the plaintiff was given his temporary occupation licence.

Having made these findings of fact I can now conveniently come to the details of the plaintiff's claim. The plaintiff, after considerable amendment of his original statement of claim, has claimed in the alternative. First he claims (in contract or quasi-contract according to his advocates) for (I quote) "fair and reasonable compensation for the loss of the use of his log pond situate at Tanjong Batu Road, Tawau, which was unlawfully occupied by the defendant without the permission of the plaintiff". On the head he claims a total of $165,600. In the alternative he claims damages for trespass — special damages of $25,761, and general damages.

Now having set the scene, as it were, let me go on to consider the plaintiff's part (as I see and hold it to have been) in this affair.

The plaintiff obtained his temporary occupation licence in May 1963 and there is no doubt that he intended to make use of the area held under it as a log pond. However, on discovering that the defendants had already fenced in part of his area, he did not ask them to remove their

pilings, or to stop using his sea-land, or take legal action against them. He may have made one complaint to Mr. Hong Teck Guan, of the defendant company, but he did not press this complaint, or take the matter any further. Instead, having approached Native Chief Titingan (for advice apparently) he had a log pond built, or partially built, at quite another place, where he had no rights by licence or otherwise,at the sea-bank near where the house of the manager of the Tawau branch of the Hongkong and Shanghai Banking Corporation is. The plaintiff said in his evidence (drawing a sketch to illustrate) that originally the defendants' log pond was smaller than the present large pond, that it was by the later extension that the large log pond came into being, and that the whole of the present small pond is in fact in his temporary occupation licence area. I do not accept this evidence, and do not accept that the plaintiff himself believes, or ever believed, this to be the case. My earlier findings of fact are against him on this, and there is no sign of any piling out to sea within the big log pond. Further, I do not believe that the plaintiff arranged with Ahmad bin Haji Ismail to make a log pond for him at Tanjong Batu, and that it was only when the logs for piling were cut and rafted that they discovered the defendants had already fenced in the small log pond. The small log pond was made before the plaintiff got his temporary occupation licence — I have held this — and the plaintiff must have known of its existence before he came to terms with Ahmad. I am satisfied that at that time, July or September 1963, the plaintiff had already accepted the *fait accompli* (he was probably also put off by the fishing "kelong" in or very near to his temporary occupation licence area) and had decided to build a log pond elsewhere.

It was only when, in January 1964, he was told by the assistant collector of land revenue he could not use the other log pond he had had built, that he resumed his complaint, going himself to see Mr. Majangil, then the assistant district officer, who was also the assistant collector of land revenue. This assistant collector of land revenue having inspected the log ponds at Tanjong Batu, wrote the following letter to the defendants.

"I have inspected your log pond today and found that you have occupied a larger space than the authorized area. You have illegally occupied 480' seaward and 280' south ward.

2. I have also noticed that you are erecting fresh stakes outside your area. This is contrary to law and I should be grateful if you could stop the erections until further notice".

There then followed, I am convinced, on the 27th of January 1964, a meeting or meetings between the plaintiff and the defendants' representatives, at one of which the assistant district officer was present. At that meeting, or in the course of those meetings, some sort of arrangement was come to between the parties. It was not, however, a final, binding agreement, as is shown by the fact that the defendants on the evening of the 27th of January 1964 wrote the following letter to the plaintiffs:—

"Dear Sir,

Re: TG. Batu Log Pond

Reference our conversation before assistant district officer and our verbal agreement this morning, we confirm that we will reserve a site of 200 feet broad southward attached to our Log Pond, for your requirement.

However, it is mutually agreed that should you not occupy the said site at any moment we have the right to use the space when necessary.

Your confirmation to the above is much appreciated.

Yours faithfully,

(Signed)

Manager,

Teck Guan Co. Ltd (Timber Dept.)."

In this letter they sought a confirmation, which was not forthcoming, the plaintiff's reply being as follows:—

"Dear Sir,

TG. BATU LOG POND

Receipt is acknowledged with thanks of your kind letter of 27th January, 1964.

I wish to draw your kind attention to para 1 of your letter particularly referring to the word 'reserve' and I am very acceptical of it. It should be clearly borne in mind that this area is being approved by the assistant collector of land revenue, Tawau, re my application for a Log Pond Site.

You have wrongfully put in wooden piles in my area and you have no desire to remove them. Regarding our recent conversation I did agree that yau *may* make use of the said area *subject* you obtaining prior permission from me each time you wish to make use of it.

Yours faithfully,

(Signed) Liew Yu Fatt."

These letters are clear and definite evidence. On them it must be taken that there was no final agreement between the parties as to the plaintiff's temporary occupation licence area (It is not accordingly necessary to go into the question of consideration, but I think I should here interpolate that is is very clear that there is no reasonable access by land for timber to the plaintiff's temporary occupation licence area except over the land owned by Mr. Hong Teck Guan). The plaintiff would go no further than to say he would allow the defendants to use his temporary occupation licence area (which he then, as now, must have claimed to be the whole of the small log pond) if they first asked his permission on each occasion when it was to be used.

The defendants did not ask for permission, either specifically or generally, but went ahead using and occupying the small log pond as before.

The plaintiff at this stage ceased any action in the matter. On his own admission he made no complaints to a Government officer or the defendants from March 1964 to the end of 1964. According to the assistant district officer there were no further complaints after he wrote a letter of 7th February 1964 to the defendants ('D' in Exhibit A). All the plaintiff did during this period was to have the number of logs (in the small log pond, one must deduce) counted on several occasions in November, 1964, in December, 1964, and in January 1965.

Apart from these inspection of logs nothing was done by the plaintiff until on the 15th of February 1965 he sent the defendant a letter ('F' in Exhibit A) enclosing a bill ('G' in Exhibit A) for $144,100, for "Log Pond hire for the storage of.....timber logs for the period from 1.6.1963 to 31.1.1965". He sent a further letter on 11th February, 1965, which reads as follows:—

"Dear Sir,

This is to advise that storage charges for timber logs in my log pond will be increased from 5 cts. per cubic ft. to 10 cts. with effect as from 1st March, 1965.

Yours faithfully,
(Signed) Liew Yu Fatt.'

The defendants sent replying letters on 18th February and 20th February 1965 ('J' and 'K' in Exhibit A), returning the bill sent, and denying any knowledge of any renting of the plaintiff's log pond. Next the lawyers came in, and after some correspondence the writ of summons was issued on the 28th day of April 1965.

It is relevant to remark that there was at this period part of a judgment debt owing by the plaintiff to the defendants, and that two of the plaintiff's motor-boats were seized in execution on January 1965 and that the plaintiff paid off the full amount remaining due on the 18th of February 1965. It was clear from some of his conduct in court and some of his evidence that the plaintiff felt bitter against (and even, perhaps, vindictive towards) the defendants, and it seems very probable that the seizure of his boats had some influence on his returning to action about the log pond and his temporary occupation licence area; not that this necessarily nullifies his claim in any way, but is a factor to be borne in mind.

As to the defendants' part in these affairs, there is no doubt that they used and occupied the small log pond from the time it was made, or soon afterwards. It must be remembered, however, that over 200 feet of that log pond, from the dividing boundary between the two ponds was covered by their own temporary occupation licence, and that the plaintiff's temporary occupation licence covered and covers only 600 of the 800 to 1000 feet which the log pond stretches out to sea. I believe the defendants' evidence that the small pond was used only for the storage of timber (in comparatively small quantities) when the large log pond was full, for keeping temporarily (no more than 24 hours at a time) logs on their way to ships, and for taking logs from the large log pond to an exporting ship.

I hold that the defendants, since the making of the small log pond occupied, and now occupy, the whole of the small log pond, including the part of it (approximately 337 feet by 600 feet) which comes under the plaintiff's temporary occupation licence. How much use they made of the plaintiff's part it is very difficult to say, but it was clearly very much less than what he alleges. Sometimes, probably, when logs were stored in the small log pond, some of them were in his part, and probably when logs were moving through the small log pond on their way to a ship some of his part was traversed. But, again here, it must be noted that both the openings, through which logs passed (and pass) out to sea, were and are outside the plaintiff's temporary occupation licence area (as they are outside the defendants').

I return now, for final decision, to the statement of claim.

The first alternative claim is, as I have said, for compensation for the alleged loss of the use of the log pond, such loss having been caused by the defendants' unlawful occupation of the log pond.

This claim is said to be contractual or *quasi-contractual* in nature.

It does not come within any of recognised categories of quasi-contracts (whether as a *quantum meruit* or otherwise), and I see no reason for even considering extending the application of the "quasi-contract" principle or theory to cover this present case, when there are other simple remedies available.

There clearly can be no claim in contract here, as the whole ground of the plaintiff's case is that the use and occupation of the log pond by the defendants was unlawful and without his permission. He cannot therefore also make the completely contradictory and inconsistent contention that there was a contract, even an implied one, between him and the defendants for their use of his temporary occupation licence area.

The first alternative claim of the plaintiff fails.

The second alternative claim is for damages for trespass.

Trespass is, basically, an unlawful entry by one person on, or an unlawul interference by one person with, land in the possession of another. The trespass alleged here must be the unlawful entry on and the use and occupation of the sea-land held by the plaintiff under temporary

occupation licence. The entry by the plaintiff, and the commencement of occupation began, however, before the plaintiff was granted his temporary occupation licence, and he cannot at that time have been in possession of the area covered by it.

Whether on being granted his temporary occupation licence the plaintiff came into any possession of that part of his temporary occupation licence area within the small log pond I have not found easy to answer. Taking a broad, common-sense, point of view, the defendants would appear throughout to have been in possession of the whole of the small log pond. But the defendants have not raised the issue of possession, and they have in effect conceded — by their attempt to come to agreement with the plaintiff in January 1964, by their written defence, and by their line of defence at the hearing — that that part of the small log pond which is not under their own temporary occupation licence they can, and could since the plaintiff got his temporary occupation licence, use only with the permission or licence of the plaintiff, and that he has and had the right to use that part, whenever he wished. They have thus admitted that he has and had power of control over that part, and that they did not have any exclusive control over it, and so would appear not to claim possession for themselves and not to dispute the plaintiff's possession of it. I have accordingly come, after considerable hesitation, to the conclusion that the plaintiff has, since he obtained his temporary occupation licence, such possession of the sea-land held under it — including that part within the small log pond — as to entitle him to sue for trespass in respect of it.

To explain further my reason for coming to this conclusion: the best definition of possession I can find in the text-books and the surprisingly scarce authorities is that given in Volume 38 of the Third Edition of *Halsbury's* Laws of England, in paragraph 1212 at page 743. It is: "Actual possession is a question of fact: it consists of two elements, the intention to possess the land, and the exercise of control over the land to the exclusion of other persons." Both parties here may be said to have, and have had, the intention to possess. The defendants have exercised control over the area in question, but *not* to the exclusion of other persons, as they admit they cannot exclude the plaintiff. The plaintiff has not exercised any actual control over the area, but his right to do so is not disputed. It is indeed difficult to say who had possession, but as Suffian J. said in *Cheong Vu Teck* v. *Anak Heng Quan & Ors.*,[1] "where possession is doubtful or equivocal the law attaches it to the title". Here, as between the parties, the title — in the shape of his temporary occupation licence — is held by the plaintiff.

The next question is: have the defendants trespassed? the answer is: Yes. They were never given, in my opinion, the plaintiff's licence or permission to use the portion of the small log pond which forms part of his temporary occupation licence area, and their occupation of it since his temporary occupation licence, and his possession, began has been as trespassers.

The final question is: to what damages is the plaintiff entitled?

He is not, in my judgment, entitled to compensation for the construcion of the other log pond (for which he claims $25,761). To have this built was entirely his own decision, and he first came to an agreement with Ahmad bin Haji Ismail to build it when he knew that the small log pond was already in existence; it was not a question — I have in effect already held this — of Ahmad's cutting logs to make a pond at Tanjong Batu, and then having to make use of them elsewhere; the logs were all along intended for the site near the house of the bank manager. The plaintiff could, at this stage, have insisted on and obtained — by legal action, if necessary — the removal of part at least of the south-eastern boundary of the small log pond and made use of his full temporary occupation licence area as a log pond. It is noteworthy that never has the plaintiff — not even now in these proceedings — taken legal action to have the south-eastern boundary pilings removed.

As to general damages, the plaintiff has failed to show that he was deprived of any timber business by the defendants' use and occupation. He did produce a purported contract for the purchase of timber with one Che Ambi bin Assi (Exhibit P.10), but he did not bring forward Che Ambi, or in any way prove that he had suffered loss under this contract. Further the document itself is not stamped, and is so technically inadmissible in evidence. The plaintiff also said that he "tendered contracts with the Government and Borneo Abacca Limited", but no representative of either was forthcoming, and he produced no evidence to support this statement. Again he said that he was twice able to borrow log pond space from Borneo Cocoa, but no witnesses from the latter firm gave evidence. The failure to produce such witnesses or any supporting evidence makes these assertions of the plaintiff quite unacceptable. Further, there is no doubt that the defendants would at any time have given him use of at least 200 feet by 800 (or 1000) of the small log pond; but he never made any attempt to take advantage of this. As I say, he has failed to show, and I do not believe, that he suffered loss, or was deprived of possible gain or profits, in or through timber business or operations. I may add that there was no evidence at all that the area could have been let to any one else for full-time, or any, use.

The defendant have, however, had the use and occupation of about 330 x 600 feet of the plaintiff's temporary occupation licence area, and he is entitled to recompense for that use. It is, I consider, an accepted principle that where a defendant has by trespass made use of the plaintiff's land, the plaintiff is entitled to receive, by way of damages, such sum as should reasonably be paid for it's use (Note that it is by way of damages, and not on a quasi-contractual calculation of *quantum meruit*). In the case of *Whitwham* v. *Wesminister Brymbo Coal and Coke Company* [2] (a case of trespass by tipping spoil or waste from a colliery on to an adjoining owner's land) Lindley, L.J. said:—

"Let us consider what the defendants have done. They have done two things. They have, first of all, so used the plaintiffs' land as to diminish its value, say by £200. Mr. Russell admits that the defendants must pay that, but contends that they are to pay no more. That leaves out of sight what more the defendants have done. What they have done more is this — they have been using the land for years. Why are not the plaintiffs to be entitled to some compensation in respect of that user? The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that lies at the bottom of what are called the way-leave cases. Those cases are based upon the principle that, if one person has without leave of another been using that other's land for his own purposes, he ought to pay for such user."

Here, the value of the plaintiff's sea-land has not been diminished, and I have held he has not suffered business or other damage or loss, except that he is entitled to be paid for the defendant's user of his sea-land. Later, in the just-quoted case (at p. 43) Rigby L.J. said:—

"Where the trespass consists in using a way over the plaintiff's land, a convenient way of assessing damages may be by a inquiry as to way-leave, which, when there is a customary rate of charge for way-leave in the locality, may furnish a convenient measure of damages; but the principle is that in some way or other, if you can do nothing better then by rule of thumb, the trespasser must be charged for the use of the land."

To look at it from a somewhat different viewpoint: in successful actions for the recovery of land where mesne profits (which are damages for trespass) are also claimed, the normal measure of damages is, as I understand it, the market rental value of the property occupied or used for the period of occupation or user, if the market rental value can be ascertained, and if it cannot, a reasonable rental value worked out by the court as best it can.

On all these premises (and remembering in particular that the plaintiff never claimed any compensation for the use until 15th February 1965 and that he carried on throughout a motor-boat business), it is my judgment that the fair measure of damages, the fair amount to make the defendants pay is an amount equivalent to what the defendants would reasonably have had to pay (call it rent or what you will) for the occupation of the plaintiff's part of the small log pond for the use to which it was actually put by them. This is more or less what the plaintiff asked for in the first part of his claim (except that the amount he wished to charge was quite unreasonable); he is thus getting by the back door, or perhaps the side-door, what he could not get at the front.

The plaintiff, in his somewhat remarkable bill, charged on the (later quite unproven) basis that there were at least 1200 logs, or 144,000 cubic feet of timber, in the small log pond throughout the period covered by his claim (1st June 1963 to 30th April 1965). Now, *first*, only the south-easterly 330 odd x 600 square feet of the small log pond is covered by the plaintiff's temporary occupation licence, and, *second*, the defendants' use of the small log pond, and particularly of the plaintiff's part of it, was very much less than that estimated and alleged by the plaintiff.

The hire-charges for storage of timber which the plaintiff attempted to make (I accept that 5 cents per cubic foot is a normal hire charge) were $7,200 *per* month. I can only go on a rough estimate myself (by rule of thumb, as Rigby L.J. said) and I would say that the defendants' use of the part of the small log pond within the plaintiff's temporary occupation licence area was between a 15th and a 20th of what he said it was. Allowing something for the actual occupation, and using again the useful thumb rule, I calculate that a fair charge per month would have been about $500. Over the 23 months of his claim (again I allow 23 months as roughly correct) the total would have come to $11,500.

I accordingly give judgment for the plaintiff in the sum of $11,500.

Finally I came to costs. This was an exorbitant, and grossly inflated and exaggerated claim. Had a reasonable amount been claimed, quite possibly a settlement would have been reached, and certainly much time, trouble and expense would have been saved. In the circumstances I am going to take what I know is the unusual step of denying the plaintiff his costs. I order that each party shall pay its own costs.

Judgment for the plaintiff. Each party to pay its own costs.